

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-580

PHILLIP M. PROCTOR, ET AL., *Petitioners*

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, ET AL., *Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioners Phillip M. Proctor, *et al.* respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 17, 1977, and the Order denying Petitioners' Motion for Rehearing and Suggestion for Rehearing *en banc* entered on July 22, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1a)¹ is reported at 1977-1 Trade Cases, ¶ 61,481 (C.A. D.C.

¹ "App." refers to Appendix to this Petition.

1977). The Opinion of the United States District Court for the District of Columbia (App. 33a) is reported at 406 F. Supp. 27 (D.D.C. 1975).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 17, 1977. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on July 22, 1977, and this Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in light of this Court's decision in *SEC v. National Securities*, the McCarran-Ferguson Act exception to the federal antitrust laws can be read to extend absolute immunity to insurance companies who combine and conspire to fix prices of independent suppliers.

2. Whether, in light of this Court's decisions in *United States v. Diebold, Inc.* and *Poller v. Columbia Broadcasting System, Inc.*, the widespread and inconsistent recent use of summary judgments against plaintiffs in complex antitrust cases is improper, and more specifically, a deprivation of their Seventh Amendment right to trial by jury.

STATUTORY PROVISIONS INVOLVED

FEDERAL ANTITRUST LAWS

Section 1. Sherman Act

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * (15 U.S.C. 1).

McCarran-Ferguson Act

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States (15 U.S.C. 1011).

(a) The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business (15 U.S.C. 1012(a)).

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law (15 U.S.C. 1012(b)).

* * * * *

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof (15 U.S.C. 1013(a)).

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation (15 U.S.C. 1013(b)).

STATEMENT OF FACTS

— Petitioners are the owners and operators of independent body shops, which businesses are engaged in the repair of automobile material damage. "Automobile material damage" is any damage to an automobile resulting from a collision, fire, or other peril for which automobile property and physical damage insurance is available.

The shop of Petitioner Phillip M. Proctor, d/b/a Proctor Auto Service, is located in Altoona, Pennsylvania; the shops of Petitioners William W. Cumming, Jr., d/b/a Cumming Motors, Inc. and Richard T. Hogg, d/b/a Dick Hogg, Inc. are located in the Greater Philadelphia area; and Petitioner Old Dominion Body Shop, Inc., was located in Alexandria, Virginia.

Respondent insurance companies sell, among other forms of insurance, automobile property and physical damage insurance. Under the terms of their policies, they agree to pay and/or reimburse insureds for the

repair of automobile damage according to the terms of the individual policies involved.

In approximately 1968 or early 1969, respondents adopted a national policy with regard to controlling the cost of automobile damage claims. They embarked upon a campaign in which the insurance company determined the amount it would pay for auto damage repairs, as opposed to negotiating an agreed price with the body shop. Among the measures employed by the companies to control their costs was the setting by the companies of the hourly labor rate, the time allowed to complete work and the prices and discounts to be paid for parts used in repairs.

Inasmuch as labor rates consist of approximately 50 to 51 percent of the total outlay of repair costs, the principal element of all insurance company cost severity programs was directed at fixing and controlling the hourly body shop labor rates. Respondent insurance companies accomplished this by creating the fiction of the "prevailing," "going," or "competitive" hourly rate in a given area and directing their appraisers and adjusters to calculate estimates only at such rates. They then would pay to petitioners and others similarly situated an amount for the repair of an automobile computed at the fixed hourly rate.

All of the respondent insurance companies knew the labor rate each was paying—the prevailing rate. They knew that if they all did not act together, that rate would rise if any one or more companies acceded to an increase. If one or more companies agreed to pay a rate higher than the prevailing rate, then those companies would secure the better garages to do their insureds' repair work. This would cause customer dis-

satisfaction and create possible delays in the repairs of the remaining companies' insureds' repair work.

No one company alone, acting independently, could effectively control the labor rate. Each knew that uniform action was invited, anticipated and needed. Each knew that cooperation was essential to the successful "control" of the labor rate.

The prevailing or competitive hourly rate in each area then, became the common formula to which all respondents adhered in writing estimates. Respondents are the joint arbitrators of the prevailing or competitive rate in any given area. A body shop is not free to adjust its labor rate to reflect its own costs or other business judgments.

Respondent enforced this rate through the use of various coercive tactics culminating ultimately in a group boycott of those shops which failed to yield to the coercive pressures.

Respondents established and utilized drive-in facilities to which they directed all their insureds to take driveable vehicles for an estimate of damages. They recognized that this was one of their best means of controlling damage repair costs because the company would be writing its own estimate of damages, utilizing the hourly rate fixed by the companies without regard to the individual repair shop which ultimately would have to repair the vehicle. Drive-ins also enabled companies to direct their insureds to take their vehicles to the insurance company "back-up" shops.

Additionally, the companies compute the time to fix or repair damaged parts by reference to set figures contained in auto damage manuals. The manuals, how-

ever, state that the times cited therein are merely guides or estimates to be used by the appraiser in judging the actual time for repair after viewing the damaged vehicle. The companies, however, have adopted a uniform policy of using the "guide" times as absolute, and do not deviate from such figures except in extraordinary circumstances.

In order to insure the success of their formula, the companies secured agreements, sometimes in writing and sometimes orally, with "back-up", "captive", "preferred", "cooperative" or "competitive" shops, wherein these shops agree to accept, in advance—sight unseen—estimates written by the companies at prices and labor rates fixed by them.

Respondents fostered use of such shops through their drive-in facilities in which, as stated previously, they were able to direct the insured to such shops.

Approximately 90 per cent of all body shop repairs are insurance related.

If independent body shops such as petitioners refused to accede to respondents' fixed estimates, they were faced with losing the business to the back-up shops. The independent shop was placed in the position of "take-it-or-leave-it"—accept our figure or go out of business.

It is the combination and conspiracy by respondent insurance companies to establish and fix the hourly labor rates to be paid to petitioners and other shops similarly situated which is the heart of this case.

REASONS FOR GRANTING THE WRIT

I. On An Important Question of Federal Law, the Decision of the District of Columbia Circuit Court of Appeals Is In Direct Conflict With a Decision of this Court.

The landmark case interpreting the meaning of the "business of insurance" within the McCarran-Ferguson Act is *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S. Ct. 564 (1969). There, after a recitation of the history of the Act, the Supreme Court concluded that:

"The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the business of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the business of insurance, does the statute apply." *Id.* at 459-60.

The Supreme Court then proceeded to designate those areas which are clearly the business of insurance. The Court stated:

"Certainly the fixing of rates is part of this business; that is what *Southeastern Underwriters* was all about. The selling and advertising of policies, . . . and the licensing of companies and their agents, are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not commerce." *SEC v. National Securities*, 393 U.S. at 460.

The Court continued:

"The relationship between insurer and insured, the type of policy which could be issued, its reliability, its interpretation—these were the core of the 'business of insurance.' " *Id.*

Where the above activities have been present, Courts of Appeals and District Courts have had few problems in determining the purview of the McCarran-Ferguson exception. The troublesome area has resulted from the additional statement the Supreme Court made in *National Securities*:

"Undoubtedly, other activities of the insurance companies relate so closely to their status as reliable insurers, that they too must be placed in the same class." *Id.*

This case falls within that category.

It is because of the judicial confusion and conflicting decisional law that has been spawned by this language that petitioners contend that clarification by this Court is both appropriate and necessary. Petitioners also respectfully submit that the instant case provides an appropriate vehicle for such clarification; the Court below analyzed and interpreted the relevant portion of this Court's *National Securities* decision in a much more expansive fashion than can be found in any other reported decision.

The Court of Appeals below held that a combination and conspiracy between automobile insurance companies to fix the hourly rates they will pay to body shops supplying service to their insureds is immune to antitrust attack because it relates so closely to their

status as reliable insurers.¹ Neither Congress nor the Supreme Court in *National Securities, supra*, indicated or intended such breadth to the "business of insurance" provision of the McCarran-Ferguson exception.

Certainly fixing prices to be paid to suppliers and boycotting those that do not comply is not the business of insurance as that term is commonly understood. Indeed, the Supreme Court concluded its discussion of the term "business of insurance" in *National Securities, supra*, by stating:

"But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policy-holder—statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance'."

Id. at 460.

In this case it is unchallenged that none of the following activities were involved in the conspiracy—the fixing of rates, the selling and advertising of policies, and the licensing of companies and their agents. Nor is it alleged that this price fixing conspiracy focused in any way on the relationship between the insurance companies and their policy holders. The policies involved simply agree to compensate the insured for damages to his automobile after a specified amount has

¹ Paradoxically, one of the respondent insurance companies herein filed a counterclaim alleging that the body shops were fixing the labor rates they would charge to the respondent insurance companies. If in fact petitioners were to fix the prices which they would charge insureds to perform repair work, that would be an obvious violation of the Sherman Act. However, the import of the Court of Appeals decision is that the insurance companies are immune from engaging in the same *per se* violations of the antitrust laws for which the body shops would be liable.

been deducted. The obligation of respondent insurance companies under their contracts with insureds is not to secure services for such insureds at prices commensurate with sums offered by insureds; rather, it is to pay for body shop work and other repairs at prices set by a competitive market place.

This case concerns both a vertical and horizontal scheme—horizontal between the insurance companies involved, and vertical, between them and captive shops—to fix the prevailing labor rate that they will pay on behalf of their insureds for auto body repair work. The purpose of the vertical arrangements with favored shops was not to secure repair services at prices commensurate with the sums offered by respondents. Rather they were designed to interfere with normal competitive conditions and to substitute prices fixed by respondents, rather than competition, regardless of the quality of the work involved.

Nor are petitioners challenging the claims practices in which respondents are involved. Rather, they are charging a horizontal agreement between insurance companies and captive shops to set a prevailing labor rate. No amount of legal rationalization or sophistry can turn such an illegal price fixing arrangement into the business of insurance.

As this Court has emphasized, exemptions to the antitrust laws are to be narrowly construed. *U.S. v. First City National Bank*, 386 U.S. 361, 87 S.Ct. 1088, 18 L.Ed. 2d 151 (1967); *California v. FPC*, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed. 2d 54 (1962); *U.S. v. McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956). But even the broadest construction will not bring into the ambit of the business of

insurance a bald agreement to fix the labor rate which respondents will accept in body shop estimates involving work done on insured's automobiles and to boycott those who will not agree to write estimates at such rates.

As to the confusion arising within the Federal judicial system regarding the interpretation of the above quoted excerpts of this Court's opinion in *SEC v. National Securities, supra*, compare the cases cited by the Court below: *Royal Drug Co. v. Group Life & Health Insurance Co.*, 419 F. Supp. 343, 347-48 (W.D. Tex. 1976); *Workman v. State Farm Mutual Automobile Ins. Co.*, Civ. No. 75-1799 (N.D. Cal., Sept. 16, 1976); *Frankford Hospital v. Blue Cross*, 417 F. Supp. 1104 (E.D. Pa., 1976); *Anderson v. Medical Service*, 1976 Trade Cas. ¶ 60,884 (E.D. Va. Feb. 10, 1976); *Travelers Insurance Co. v. Blue Cross*, 481 F.2d 80, 82-83 (3d Cir. 1972), cert. denied, 414 U.S. 1093 (1973); *American Family Life Insurance Co. v. Planned Marketing Associates*, 389 F. Supp. 1141 (E.D. Va. 1974); *DeVoto v. Pacific Fidelity Life Insurance Company*, 354 F. Supp. 847 (N.D. Cal. 1973) and *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 51 (5th Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

It is essential, therefore, that this Court decide this important question of antitrust law. The antitrust insulation for insurance companies established by the Court of Appeals carries the "business of insurance" concept farther than any other Circuit has gone to date. It extends antitrust immunity to insurance companies for price fixing practices which in no way affect their relationship with insureds and into an area where only third party suppliers of service and in-

sureds should properly and legally be involved. In effect, the "business of insurance" concept has been extended to include business relationships to which the insurance companies are not appropriate parties. This is contrary to the purpose and intent of the McCarran-Ferguson Act and conflicts with the decision of this Court in *SEC v. National Securities, supra*.

II. The Decision of the District of Columbia Court of Appeals So Far Departs from the Accepted and Usual Course of Judicial Conduct Involving an Important Issue as to Call for this Court's Jurisdiction and is Inconsistent with other Decisions of this Court.

In *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962), this Court cautioned against affirming summary judgments in antitrust cases by drawing inferences from the evidence which should have been reserved for the jury.

In *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), this Court also stated that in considering a summary judgment motion, it was the job of the various Federal courts to put the best face possible on the evidence from appellees' point of view. However, despite *Poller* and *Diebold*, federal courts have in recent years been increasingly granting and affirming summary judgment motions for defendants in complex antitrust litigation.

Petitioners respectfully submit that given the course of the recent decisional law, the time has come for this Court to reaffirm *Poller* and *Diebold*.

This case presents a particularly good vehicle for the Court to do this. Not only were a mass of disputed facts left entirely unresolved without either a hearing or even oral arguments being allowed on the motion; in affirming the District Court's granting of summary

judgment, the Court of Appeals, despite its finding that the District Court applied the wrong rule of law to the question of boycott, coercion and intimidation,² concluded that respondents did not come forward with sufficient evidentiary support for their allegation of a boycott to justify a full trial on the merits of that claim.³

If the decision below stands, it means in effect that appellants from district court decisions in cases such as this must in fact try their case to courts of appeals instead of to a jury. In substituting trial by appeal brief for trial by jury, it usurps the appropriate function of the jury as the final arbiter of facts, inferences to be drawn therefrom, and the credibility of witnesses. Indeed, here, the Court of Appeals accepted at face value respondents' statement of facts with all inferences drawn in their favor.

² The arguments in the District Court were primarily legal in nature and related to the breadth of the McCarran-Ferguson Act exception. The Court of Appeals rejected the legal principles relied on by the District Court in granting summary judgment relating to the breadth of the Act as it applies to boycott, coercion and intimidation. It also rejected the statement of the District Court that:

"The *allegations* of boycott, coercion and intimidation do not raise questions of material fact sufficient to preclude the operation of Rule 55." (Emphasis added)

Nevertheless, the Court of Appeals determined on the basis of the Appeal Briefs and pleadings that there were not sufficient facts on the record to warrant submitting this case to a jury.

³ Contrary to the stated understanding of the Court of Appeals, at the same time respondents filed their summary judgment motion on the basis of the McCarran-Ferguson Act in the District Court, they also filed a motion for summary judgment on the ground that there was no genuine issue as to any material fact. That motion has never been determined by the District Court and remains open.

The decision below in addition to usurping a party's Seventh Amendment right to trial by jury, also emasculates both the letter and spirit of this Court's *Poller* and *Diebold* decisions.

The weaknesses in the Court of Appeals' decision are succinctly set forth in the dissenting opinion of Circuit Judge Wright. He wrote:

The court, after rejecting the legal principles relied on by the District Court in granting summary judgment to appellees, analyzes the evidence itself and comes to the same result. While the temptation to avoid the jury trials in antitrust cases is understandable, I would resist that temptation in this case since I believe the evidence offered by both sides on the motion for summary judgment was sufficient to have a jury resolve, on proper instructions, the issues raised relating to the business of insurance, conspiracy, and boycott. The Supreme Court has cautioned against affirming summary judgments in antitrust cases by drawing inferences from the evidence that should have been reserved for the jury. *See, e.g., Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962). This caution applies, in my judgment, with particular emphasis where the District Court has granted summary judgment after applying the wrong legal principles to its appraisal of the evidence.

Most of the evidence offered by both sides on appellees' motion for summary judgment is fairly outlined in the court's opinion. On that evidence a jury could reasonably have found, as appellants suggest, that the conspiracy consisted of an agreement among appellee automobile insurers to gain an advantage over their competitors by limiting appellees' cost of car repairs through boycott of car repairmen who refuse to make car repairs at the dictated prices.

In addition, other evidence fairly shows that the automobile repair industry is one marked by competition as to both price and quality of service. It would also support a finding that insurers were concerned that poor service caused by paying too low a rate for repairs would lead to dissatisfaction among insureds. Accordingly, it is not unreasonable to suggest, as appellants have done, that a jury could conclude that concerted action was needed if appellee insurance companies were to achieve both low cost repairs and adequate service. The record would also support a finding that appellee insurance companies sought to attain that objective by communicating among themselves on such matters as the most effective use of the insurers' drive-in claim service where claims would be adjusted and checks drawn for presentation to "captive" repair shops. In addition, there is evidence that some insurers issued two-party settlement checks naming as payees the insured and a "captive" body shop. Obviously the effect of this activity was to steer customers away from disfavored shops and would, in my opinion, justify a finding of boycott, especially since such steering would seem an integral part of effectuating the insurers' plan to direct volume business to their "captive" shops, thereby putting price pressure on independents.

By sketching the evidence favorable to appellants, I do not mean to suggest that a reading of boycott or conspiracy in restraint of trade is inevitable on the evidence in this case. Certainly the majority has a point in its observation that persons acting independently might have an incentive to adopt some of the elements of the claims adjustment scheme adopted by the appellee insurers.² My position, however, is simply that it is not the job of this court to put the best face possible on the evidence from appellees' point of view. Under the

law, on appellees' motion for summary judgment precisely the opposite approach is required. *E.g.*, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Under the proper standard, I submit, appellants tendered sufficient evidence to go to the jury. (footnotes omitted)

This case involves the critical and basic question of a right to jury trial as constitutionally guaranteed and the appropriate function of the trier of fact and the Appeals Court within the judicial system. Its resolution affects the crux of judicial relationships and sets the limits within which an Appellate Court can replace the jury in determining factual disputes. It is imperative that this Court reaffirm *Poller* and *Diebold*, and definitively resolve these fundamental issues.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1183

PHILLIP M. PROCTOR, d/b/a PROCTOR AUTO SERVICE,
ET AL., APPELLANTS

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, ET AL.

Appeal from the United States District Court
for the District of Columbia
(Civil Action 249-72)

Argued October 22, 1976

Decided June 17, 1977

Before: WRIGHT, McGOWAN and MACKINNON, *Circuit
Judges*.

Opinion for the Court filed by *Circuit Judge McGOWAN*.
Dissenting Opinion filed by *Circuit Judge WRIGHT*.

Opinion

McGOWAN, Cir. J.: Appellants, owners of four automobile repair shops, brought suit in the District Court alleging that the claims adjustment and settlement practices of five automobile insurance companies involved price-fixing and a group boycott in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The District Court granted summary judgment in favor of the insurance companies, [1975-2 TRADE CASES ¶ 60,641] 406 F. Supp. 27 (D. D. C. 1975), on the basis of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which confers broad antitrust immunity upon the "business of insurance," to the extent such business is regulated by the state law.¹ Although the McCarran Act provides that the Sherman Act shall remain applicable to "any agreement to boycott, coerce, or intimidate, [and to any] act of boycott, coercion, or intimidation,"² the District Court concluded that appellants' allegations were insufficient to satisfy this "boycott exception" to the McCarran Act's antitrust exemption.

¹ Section 2(b) of the McCarran-Ferguson Act (hereinafter sometimes referred to as the "McCarran Act" or "the Act"), 15 U.S.C. § 1012(b), provides in relevant part:

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

² Section 3(b) of the McCarran Act, 15 U.S.C. § 1013(b), states in full:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

On appeal the District Court's decision is challenged in two respects. Appellants assert, first, that the disputed insurance company practices are not the "business of insurance" within the meaning of the McCarran Act; and, second, that material issues of fact precluding summary judgment were raised under the boycott exception, properly construed. These questions are not free from difficulty, given the rhetorical imprecisions of the McCarran Act. Although we cannot agree with all of the District Court's reasoning on the boycott issue, we affirm.

I.

[Automobile Repair Prices]

Appellants' complaint charged that appellees had engaged in a combination and conspiracy to (1) fix the prices at which automobile repairs are made and, more specifically, the hourly labor rates paid to repair shops, the time allowances for repair jobs, and the prices for parts used in making repairs; (2) coerce and intimidate repair shops to complete work for insured parties at the fixed prices; and (3) boycott shops, such as those owned by appellants, which refused to accede to the fixed rates.³

³ The complaint also named as defendants two companies retained by automobile insurance companies for the purpose of adjusting and settling claims. Separate motions for summary judgment were granted in favor of these two defendants, and the allegations against them are not before us on this appeal.

In addition to themselves, appellants purported to sue on behalf of a nationwide class consisting of approximately 9,200 repair shop owners and operators. Although the District Court denied certification of the class on March 26, 1974, and the propriety of that ruling is not at issue in the instant appeal, the Automotive Service Councils, Inc.—a trade association representing the automobile repair and service industry—has submitted a brief as *amicus curiae*, urging reversal of the summary judgment awarded to appellees on the basis of the McCarran-Ferguson Act.

Treble damages and injunctive relief were requested pursuant to section 4 of the Clayton Act, 15 U. S. C. § 15.

After three years of extensive discovery, a more refined version of the price-fixing allegation emerged: appellants asserted that the five insurance companies had entered into a horizontal agreement to pay or reimburse their policyholders according to a common formula which involved the "prevailing labor rate," a standardized estimate of the amount of labor required, and a compulsory discount on parts. They characterized as the "core" of their case the alleged combination and conspiracy to utilize only the prevailing labor rate in adjusting and settling claims. Although it was not contended that the different insurance companies had in fact employed a common hourly rate at all times,⁴ or agreed to set the hourly rate at a particular dollar amount, appellants averred that the agreement to adhere to the prevailing rate had the illegal purpose and effect of slowing down legitimate increases in the price of repairs.

[Boycott of Repair Shops]

Elaborating somewhat on the claim of coercion and intimidation made in the complaint, appellants alleged that the horizontal agreement was implemented through "vertical arrangements" with "captive" or "preferred" repair shops who, under economic pressure, committed themselves to do repairs for insureds at the prevailing labor rate. Appellants were able to add little to their charge that appellees engaged in a group boycott of non-

⁴Indeed, deposition testimony by appellant Hogg established that, in the community in which his shop was located, two of the insurance companies were using a labor rate of \$8.00 per hour at the same time that two of the other appellees were preparing damage estimates on the basis of \$9.00 per hour rate.

cooperative shops, contending only that each insurance company used drive-in claims facilities to set the amounts to be paid on each claim and, in some cases, directed insureds to preferred repair shops. It was not alleged that appellees had circulated lists of shops to be black-listed on the one hand or favored on the other, nor was it argued that individual insurance companies had entered into combinations or conspiracies with their policyholders to boycott appellants' shops.

Appellees moved for summary judgment on two grounds: first, the asserted failure of appellants to adduce any evidence in support of their charges of horizontal agreement, and second, even assuming the truth of appellants' allegations, the immunity of the alleged practices from the federal antitrust laws by virtue of the McCarran-Ferguson Act. The District Court granted the motions on December 18, 1975, relying primarily on the second ground.

The court observed that the controverted practices, if in fact indulged by the insurance companies, would be an integral part of the claims adjustment and settlement process and, as such, would qualify as the "business of insurance" within the meaning of the McCarran Act. The court based this holding on its reading of the leading case of *SEC v. National Securities, Inc.*, 393 U. S. 453 (1969), and, more specifically, on the following conclusion:

To conclude, the settlement and payment of damage repair claims is (1) a basic part of the contractual obligation owed by the insurance company to the insured, whether or not the payment is made to the insured or on his behalf, (2) directly affects the rate-making structure of the insurance company and the level of premiums to be charged, and (3) is connected directly with the writing of the policy, its interpretation and enforcement. The practices chal-

lenged here are *peculiar* to the business of insurance within the meaning of the McCarran Act.

406 F. Supp. at 30 (emphasis in original).⁵ The court also found that the challenged practices are regulated by state law to the degree required to support an exemption from federal law under the Act.⁶

Appellants' attempt to avoid the McCarran exemption through allegations of boycott, coercion, and intimidation was rejected on both factual and legal grounds. The court concluded, first, that "the claims of dispute as to material fact in this connection are vague and lack adequate record support."⁷ Second, and in the district judge's assessment "perhaps more important," the court held that even if appellants' charges were sufficiently documented, the boycott exception would be inapplicable as a matter of law. This latter holding was rested on a line of lower court cases which had given a narrow construction to the exception, reading it only to encompass blacklists of insurance companies or agents by other insurance companies or agents. *Id.* at 32, citing *Transnational Insurance Co. v.*

⁵ Although omitted from this concluding paragraph, an additional proposition in support of the "business of insurance" holding appeared earlier in the court's opinion:

"The way and method an insurance company discharges claims under its policies relate closely to its status as a reliable insurer." 406 F. Supp. at 29.

⁶ *Id.* at 30-31. One of the appellants does business in Virginia and three in Pennsylvania. Accordingly, the District Court analyzed the law of those states to determine whether the state regulation requirement was satisfied.

⁷ *Id.* at 31. The court added:

"There appears to be no collective refusal to deal with plaintiffs since plaintiffs' services were utilized throughout the period of this suit by persons insured by plaintiffs."

Id.

Rosenlund [1967 TRADE CASES ¶ 72,025], 261 F. Supp. 12, 16-27 (D. Ore. 1966); *Mitgang v. Western Title Insurance Co.*, 1974-2 TRADE CASES ¶ 75,322, at 98,026 (N. D. Cal. 1974); *Addrisi v. Equitable Life Assurance Society* [1974-2 TRADE CASES ¶ 75,274], 503 F. 2d 725 (9th Cir. 1974), cert. denied, 420 U. S. 929 (1975); *Meicler v. Aetna Casualty & Surety Co.* [1975-1 TRADE CASES ¶ 60,131], 506 F. 2d 732, 734 (5th Cir. 1975), aff'd [1974-2 TRADE CASES ¶ 75,414], 372 F. Supp. 509 (S. D. Tex. 1974).

II.

[Business of Insurance]

We are in substantial agreement with the District Court's reasoning on the "business of insurance" issue. Our differences are essentially matters of emphasis, and do not affect the ultimate conclusion that the practices challenged by appellants fall within the statutory phrase.

As the District Court recognized, analysis must begin with the Supreme Court's decision in *National Securities, supra*. In that case, the SEC brought suit against the corporate owner of an insurance company, claiming that misrepresentations in violation of Rule 10b-5 had been made in connection with the merger of the subsidiary and another insurance company. The Court held that state laws aimed at protecting the interests of shareholders of insurance companies do not regulate the "business of insurance" as that term is used in the McCarran Act, and that misrepresentations made to such shareholders accordingly are not immunized from suit under the federal securities laws. See 393 U. S. at 457-61.

In reaching this conclusion, the Court noted that the internal legislative history of the McCarran Act offers little guidance on the intended meaning of the words "business of insurance." Consequently, the Court relied heavily on an analysis of the Act's historical context, which it described as follows:

The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Assn.* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. Congress reacted quickly. Even before the opinion was announced, the House had passed a bill exempting the insurance industry from the antitrust laws 90 Cong. Rec. 6565 (1944). Objection in the Senate killed the bill, 90 Cong. Rec. 8054 (1944), but Congress clearly remained concerned about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first section; Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 59 Stat. 33 (1945), 15 U. S. C. § 1011. As this Court said shortly afterward, "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 429 (1946).

• • • Under the regime of *Paul v. Virginia*, *supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision

threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

Id. at 458-59.

In light of this history, the Court concluded that the "business of insurance" was not intended to cover all of the activities of insurance companies, but was meant only to include activities centering around the insurance contract and the relationship between the insurance company and the policyholder, as well as other activities of insurance companies that relate closely to their status as reliable insurers:

The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC v. National Casualty Co.* [1958 TRADE CASES ¶ 69,059], 357 U. S. 560 (1958), and the licensing of companies and their agents, *cf. Robertson v.*

California, 328 U. S. 440 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Id. at 459-60 (emphasis on last five sentences supplied).

Applying this standard to the facts before us, we have little doubt that what appellants have characterized as the "core" of their case, the alleged horizontal agreement to pay insureds' claim on the basis of the prevailing labor rate, as well as appellees' supposed adherence to a common formula to compute damage estimates, fits within the "core" of the "business of insurance." The essence of the automobile insurance contract is the insurance company's agreement, in return for a premium, to make payments to or on behalf of the policyholder for losses arising out of the ownership, maintenance, or use of an automobile. The determination by the insurance company of the amount to be paid in discharge of this contractual obligation is at the heart of the relationship between insurer and insured, and is directly connected with the reliability, interpretation, and enforcement of the insurance contract.

[Automobile Repair Business]

We have somewhat more difficulty with appellants' allegations of vertical arrangements with preferred shops and a group boycott of non-cooperative shops.⁸ With respect to these latter practices, there is at least a surface attraction to the argument pressed upon us by appellants, that what is involved here is the business of automobile repair rather than the business of insurance. Certainly, to the extent that these practices involve direct relationships between the insurance company and non-policyholders, and are less clearly connected to the terms of the contract between the insurer and the insured, they are further from the core of the business of insurance.

Nevertheless, *National Securities* suggests that activities may be considered to fall within the business of insurance if they affect the relationship between the company and the policyholder "directly or indirectly." See 393 U. S. at 460, quoted on pp. 10-11 *supra*. The question is ultimately one of line-drawing, based on the facts of the individual case. And, of course, the fact that a practice may affect other types of business is not dispositive of whether it is sufficiently related to the business of insurance to come within the McCarran Act's protection.

In the circumstances of this case, we conclude that the alleged agreements with preferred shops and the asserted group boycott of non-cooperative shops are connected closely enough to the contractual relationships between appellees and their policy-holders, and with reliability, interpretation, and enforcement of those contracts, to qualify as the business of insurance.⁹ See *Royal Drug Co. v.*

⁸ Of course, notwithstanding the fact that appellants have cast this set of allegations in terms of coercion, intimidation, and boycott, were we to find that these practices are outside the scope of the "business of insurance," the McCarran Act would not shelter them from the antitrust laws, and we would not need to reach the question of the applicability of the boycott exception.

⁹ The District Court's characterization of the challenged conduct

Group Life & Health Insurance Co. [1976-2 TRADE CASES ¶ 61,000], 419 F. Supp. 343, 347-48 (W. D. Tex. 1976) (reaching similar conclusion with respect to agreements between medical insurance company and "participating pharmacies," establishing terms of reimbursement to pharmacies for drugs dispensed to policy-holders). By the very terms of their allegations, appellants concede that these practices stemmed solely from appellees' desire to slow the rate of increase in the claims payments required to satisfy the companies' contractual obligations to their policy-holders.¹⁰ Notwithstanding their effect on non-policy-holders, the activities unquestionably grow out of, and are tied to, the claims adjustment and settlement process. The arrangements with favored shops were designed to secure repair services for insureds at prices commensurate with the sums offered by the insurance companies in settlement of their obligations; and the group boycott, if successfully executed, would have prevented policyholders from using repair shops at which those sums might not provide compensation for repairs to the full extent guaranteed by the insurance contract.

as "peculiar" to the business of insurance, see text accompanying note 5 *supra*, is perhaps a helpful way of stating this conclusion. See *American Family Life Assurance Co. v. Planned Marketing Assoc., Inc.* [1975-1 TRADE CASES ¶ 60,210], 389 F. Supp. 1141, 1145 (E. D. Va. 1974) ("In *National Securities* the court held that 'the business of insurance' pertained to those activities *peculiar* to the insurance industry.")

¹⁰ It is not contended that appellees' effort to give business to some shops, and take away business from other shops, was motivated by reasons independent of the prices charged by those shops. Nor is it alleged that appellees were trying to drive existing body shops out of business in order to facilitate vertical integration by insurance companies into the auto repair industry. We therefore need not decide whether the presence of such factors would have placed the disputed activities outside the business of insurance.

[*Insurance Rates*]

Of central significance in this entire context is the close relationship between the cost of reimbursement damage claims, on the one hand, and the insurance rates charged by appellees, on the other.¹¹ Any doubt as to whether these activities should be deemed to fall within the business of insurance is ponderably eased by that economic reality. Indeed, in a case involving similar activities, the Third Circuit concluded that the substantial impact on rates, in and of itself, was sufficient to satisfy the statutory standard, based on the language in *National Securities* to the effect that the business of insurance includes "other activi-

¹¹ The District Court made the following finding:

"... claims-settlement procedures have a direct connection with an insurance company's rate-making structure. The record clearly shows a close relationship between the costs of automobile repairs in Pennsylvania and Virginia, the states where plaintiffs do business, and the levels of premiums charged by defendants to its insureds. It is a fact of life that the cost of repairs, including labor charges and the cost of repair parts, paid in the settlement of damage claims are an important factor in the ratemaking structure of insurance companies obligated under their policies to pay damage claims. Claims-settlement practices which include activities complained of in this suit have a vital impact on ratemaking" 406 F. Supp. at 29 (footnote omitted).

This finding was supported by undisputed affidavits submitted by appellees, including an affidavit by State Farm's Chief Actuary, stating in relevant part:

"... the costs incurred when the Company pays insureds or third-party claimants comprise the largest single element in the premium structure. In 1974 the amount paid to insureds or third-party claimants to settle automobile physical damage claims in Virginia and Pennsylvania represented approximately 67.7% of total earned premiums allocated to physical damage coverages in those states. Obviously, costs of this magnitude have a direct impact on the premium levels charged for automobile insurance and the financial stability of a company such as State Farm."

App. 100. More particularly, appellants themselves assert that labor costs constitute over 50% of the insurance companies' total outlays for automobile repairs.

ties of insurance companies [which] relate so closely to their status as reliable insurers.¹¹ *Travelers Insurance Co. v. Blue Cross* [1973-1 TRADE CASES ¶ 74,596], 481 F. 2d 80, 82-83 (3d Cir.), cert. denied, 414 U. S. 1093 (1973), citing *National Securities, supra*. 393 U. S. at 460.¹² Although its reasoning was somewhat different, the District Court in the instant case also concluded that the vital impact of the practices in question on the rate-making structure necessarily meant that they should be included within the Congressional concept of the business of insurance:

[The] activities complained of in this suit have a vital impact on rate-making and must, of necessity, be included within the term "business of insurance."

• • •

... The "business of insurance" can touch relationships between insurance companies and non-policy holders such as automobile repair shops when such relationships are closely connected with the insurer-insured relationship through the profound effect of the costs of damage claims in the rate-making structure.

¹¹ In the *Travelers Insurance* case, a private insurance company brought suit against Blue Cross, claiming that Blue Cross had violated §§ 1 and 2 of the Sherman Act by coercing hospitals into signing a standard contract prescribing the amounts and terms under which Blue Cross would reimburse the hospitals for services rendered to its subscribers. The terms of the contract were such that Blue Cross was able to offer lower rates than competing private insurance companies. Moreover, there was considerable economic pressure on the hospitals to sign the contracts, since those which refused to agree were not reimbursed by Blue Cross in amounts sufficient to cover their costs. See 481 F. 2d at 82, 84 & n. 12. Nonetheless, the Third Circuit held that the contracts qualified as the business of insurance, and were not achieved through "boycott, coercion, or intimidation."

See 406 F. Supp. at 29-30 (emphasis supplied).

We need not decide whether the effect on insurance rates should be analyzed in terms of appellees' "status as reliable insurers" or, instead, in terms of its connection with the relationship between insurer and insured; nor must we decide whether a substantial effect on rates, standing alone, is enough to qualify an activity as the business of insurance.¹³ For the purposes of this case, it is sufficient to say that the vital impact on appellees' rates, found by the District Court, provides additional support for our conclusion that the disputed practices are a part of the business of insurance.

[*Precedent*]

While the reasoning and facts vary somewhat from case to case, our conclusion is also supported by the numerous decisions, in addition to *Travelers Insurance* and *Royal Drug, supra*, which have upheld similar arrangements between insurance companies and suppliers of services to insureds, in the face of claims that the practices went beyond the business of insurance and involved boycotts, coercion, or intimidation as well. *E. g., Workman v. State Farm Mutual Automobile Ins. Co.*, Civ. No. 75-1799 (N. D. Cal.,

¹² The proposition that the business of insurance includes any practice which has a substantial impact on insurance rates apparently stems from a District Court case, *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.* [1959 TRADE CASES ¶ 69,367], 175 F. Supp. 857 (N. D. Cal. 1959), decided before the Supreme Court's decision in *National Securities*. See *Travelers Ins. Co. v. Blue Cross, supra*, 481 F. 2d at 83; *Proctor v. State Farm, supra*, 406 F. Supp. at 29-30. The opinion in *National Securities* neither cites nor discusses *California League*, and at least one commentator has speculated that the *National Securities* standard for determining what constitutes the business of insurance was intended to be narrower than the "effect on rates" criterion relied upon in *California League*. Comment, *The McCarron Act's Antitrust Exemption for "The Business of Insurance": A Shrinking Umbrella*, 43 Tenn. L. Rev. 329, 344-46 (1976).

Sept. 16, 1976) (arrangements between automobile insurance company and automobile body repair shops); *Frankford Hospital v. Blue Cross*, [1976-2 TRADE CASE: ¶ 61,030], 417 F. Supp. 1104 (E. D. Pa. 1976) (agreements between medical insurance company and hospitals); *Anderson v. Medical Service*, 1976-1 TRADE CASES ¶ 60,884 (E. D. Va., Feb. 10, 1976) (contracts between medical insurance company and physicians).

The decision of the Fifth Circuit in *Battle v. Liberty National Life Insurance Co.*, 493 F. 2d 39 (5th Cir. 1974), cert. denied, 419 U. S. 1110 (1975), is not to the contrary. In that case, a burial insurance company had entered into a contract with its wholly owned subsidiary, under which the subsidiary agreed to furnish the merchandise and services guaranteed by the burial insurance policies. The subsidiary in turn entered into agreements with a number of funeral homes and directors, establishing those homes as "authorized" providers of services to the insurance company's policyholders, setting the terms by which the subsidiary would reimburse the homes for those services, and requiring the homes to use certain merchandise supplied or approved by the subsidiary. An antitrust action on behalf of the class of affected funeral homes and directors was brought against the insurance company and its subsidiary, but the trial court granted a motion to dismiss for failure to state a claim, in part on the basis of the McCarran-Ferguson Act. The Fifth Circuit reversed, holding with respect to the McCarran Act defense that further factual development was required before the trial court properly could determine whether the activities in question were part of the business of insurance. See *id.* at 49-51.

In reaching this holding, however, the court carefully distinguished *Travelers Insurance*, in words which might apply equally well to the arrangements between appellees and the repair shops in the case at bar:

Significantly, the relationship between the insurance company and the hospitals in *Blue Cross* was a direct contractual relationship. The result of this contract was simply the performance of the insurer's responsibilities owed to the insured under the insurance contract and nothing more.

Id. at 50 (footnote omitted). The court emphasized that the case before it did not merely involve direct relationships between the insurance company and providers of services to insured, but instead involved an additional party—an "intermediary"—under whose guise the insurance company "may have exceeded the business of providing burial insurance and encroached upon the business of providing funeral services." See *id.* There is, of course, no such intermediary here and, consequently, the danger that appellees have gone beyond the business of insurance is less pronounced. See also note 10 *supra*.

Appellants and *amicus* place heavy reliance on the decisions of the District Court for the Northern District of California in *Hill v. National Auto Glass*, 293 F. Supp. 295 (N. D. Cal. 1968), 1971 TRADE CASES ¶ 73,594 (N. D. Cal., June 1, 1971), holding that an automobile insurance company was not engaging in the business of insurance when it directed its policyholders to selected glass shops for the purchase and installation of automobile windshields. But that case is distinguishable on its facts since the activities at stake presumably did not have a substantial impact on insurance rates, see *Travelers Insurance Co. v. Blue Cross*, *supra*, 481 F. 2d at 83, and it was not conceded, as it is here, that the insurance company's only purpose was to minimize increases in the cost of reimbursing damage claims, see note 10 & accompanying text *supra*. To the extent that the reasoning in these decisions is nevertheless inconsistent with our holding, we must respectfully disagree. We note, however, that under our construction of the boycott exception, to which we now turn, the ultimate re-

sult in *Hill* conceivably might have been the same in any event, since a principal allegation there was that defendants had conspired to boycott plaintiff's glass shop. See 293 F. Supp. at 296.

III.

[Scope of Boycott Exception]

Without express acknowledgement by any of the courts of appeals that have ruled on the matter, a split in the circuits seem to have developed as to the proper scope of the McCarran Act's boycott exception. The District Court in the instant case invoked the narrow construction—limiting the exception to boycotts of insurance companies by other insurance companies or agents—which has been adopted by the Fifth and Ninth Circuits. See *Meicler v. Aetna Casualty & Surety Co.*, [1975-1 TRADE CASES ¶ 60,131], 506 F. 2d 732, 734-35 (5th Cir. 1975); *Addrissi v. Equitable Life Assurance Society*, [1974-2 TRADE CASES ¶ 75,274], 503 F. 2d 725, 728-29 (9th Cir. 1974), cert. denied, 420 U. S. 929 (1975). But see *Battle v. Liberty National Life Insurance Co.*, [1974-1 TRADE CASES ¶ 75,030], 493 F. 2d 39, 51 (5th Cir. 1974), cert. denied, 419 U. S. 1110 (1975).

On the other hand, there are three circuits whose decisions appear to be premised on a broader construction. In *Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co.*, [1963 TRADE CASES ¶ 70,978] 326 F. 2d 841 (2d Cir. 1963), cert. denied, 376 U. S. 952 (1964), the Second Circuit regarded the boycott exception as covering "all boycotts or agreements to boycott condemned by the Sherman Act," *id.* at 846, although the facts of the case would have fit within the narrow construction since the suit alleged that one insurance company had participated in a conspiracy to boycott another insurance company. A recent decision of the Fourth Circuit, holding a complaint to have stated a claim falling within the boycott exception, also applied this general approach of construing the exception

to cover any boycott prohibited by the Sherman Act; but in that case the allegations would not have come within the narrow interpretation and, indeed, were similar in some respects to the charges in the instant case. *Ballard v. Blue Shield*, [1976-2 TRADE CASES ¶ 61,123], 543 F. 2d 1075, 1078 (4th Cir. 1976).¹⁴ Finally, in *Travelers Insurance Co. v. Blue Cross*, *supra*, the Third Circuit considered on its merits, and rejected without stating what it considered to be the proper scope of the boycott provision, a claim that went beyond a mere blacklist of insurance companies or agents—in particular, a claim that Blue Cross had coerced hospitals into signing its standard contract setting the terms of reimbursement for services rendered to its policyholders. See 481 F. 2d at 84; note 12 *supra*.¹⁵

We agree with those circuits which have declined to adopt the narrow construction of the boycott exception, although, as we shall explain in Part IV below, we do not find sufficient guidance for our purposes in the general proposition that the exception encompasses all acts of boycott, coercion, or intimidation, and all agreements to boy-

¹⁴ In *Ballard*, a group of chiropractors charged that six corporations that sell Blue Cross-Blue Shield health insurance, their physician-directors, and a state medical association had "conspired to refuse insurance coverage for the services offered by chiropractors to refuse payment of claims for services rendered by chiropractors even though claims for identical services by physicians are honored, and to refuse permission for chiropractors to participate as officers in the companies offering Blue Shield Plans." 543 F. 2d at 1078. The complaint asserted that the purpose and effect of these practices was to eliminate competition from chiropractors in the health services field. See *id.* at 1077. The court held that these allegations stated a claim of group boycott in violation of the Sherman Act and, therefore, were within the boycott exception to the McCarran Act. *Id.* at 1078.

¹⁵ Travelers did not challenge the finding of the trial court that Blue Cross had at no time tried to influence the relationship between hospitals and other insurance companies, see 481 F. 2d at 84, and thus no allegation of boycott was at issue in that case.

cott, coerce or intimidate, that are prohibited by the Sherman Act. Certainly there is no hint in the plain language of the provision that only acts and agreements directed against insurance companies or agents were to be subject to the exception. And our examination of the legislative history of the provision, and the target at which it was aimed, convinces us that no such limitation was intended.

[Legislative History]

The narrow construction apparently was first articulated in *Transnational Insurance Co. v. Rosenlund* [1967 TRADE CASES ¶ 72,025], 261 F. Supp. 12 (D. Ore. 1966), and was grounded in that court's reading of the legislative history of the boycott provision:

The legislative history shows that the boycott, coercion and intimidation exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a "black-list," which would name companies or agents which were beyond the *pale*. This list, in effect, was a directive to an agent not to write insurance in the name of or for the black-listed company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies.¹

¹ 91 Congressional Record, p. 1087 (79th Congress, 1st Session.)

Id. at 26-27 (emphasis in original). This passage was heavily relied upon by the District Court here, see 406 F. Supp. at 32, and in each decision cited by the District Court to support its reading of the boycott exception, see *Meidler v. Aetna Casualty & Surety Co., supra*, 506 F. 2d at 734, 372 F. Supp. at 509; *Addrissi v. Equitable Life Assurance Society, supra*, 503 F. 2d at 728-29; *Mitgang v. Western*

Title Insurance Co., 1974-2 TRADE CASES ¶ 75,322, at 98,026 (N. D. Cal. 1974).

Yet *Transnational* cited only a single page from the Congressional Record to support its interpretation, 91 Cong. Rec. 1087 (1945), and the only relevant material on that page is a speech on the floor of the House by Congressman Celler merely urging that the boycott exception be drafted so as to cover, in express terms, *agreements* to boycott, coerce, or intimidate, as well as *acts* of boycott, coercion, or intimidation.¹⁶ While it does emphasize the importance of preventing insurance companies and agents from blacklisting other insurance companies and agents, there is nothing in the speech to indicate that such activities are the only ones comprehended by the boycott exception. And *Meidler, Addrissi, and Mitgang* neither cite nor discuss any additional materials from the legislative history which might support their position.¹⁷

The House and Senate Committee Reports on the bill which ultimately became the McCarran Act provide strong evidence that the boycott exception was not intended to be confined to blacklists of insurance companies or agents. In

¹⁶ The bill which emerged from the Senate expressly covered agreements as well as acts, but the bill reported out of the House Judiciary Committee—the bill to which Congressman Celler was addressing himself—only referred to acts. As the current statutory language evidences, see note 2 *supra*, Congressman Celler's position prevailed in the Conference Committee. See 91 Cong. Rec. 1088 (1945) (Congressman Walter agrees to accept express language on agreements when the bill goes to conference, asserting that House language covering acts would have encompassed agreements in any event); *id.* at 1396 (text of bill as it emerged from conference).

¹⁷ It should be noted that the *Transnational* court did not rest its rejection of the boycott allegations in that case solely on its reading of the legislative history of the boycott provision. Rather, the court proceeded to examine the record carefully, and concluded that there was no evidence of any kind of boycott falling within the Sherman Act. See 261 F. Supp. at 27-28.

its section-by-section analysis of the bill, the Senate Report describes the boycott provision as follows:

[The boycott section] provides that at no time are the prohibitions in the Sherman Act against *any agreement or act* of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain *in full force and effect*.

S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945) (emphasis supplied). The House Committee Report contains a virtually identical statement.¹⁸

We have examined the floor debates in the House and Senate and have found nothing to shake our conclusion that the narrow construction adopted by the District Court must be rejected. Although there is at least one reference, other than Congressman Celler's, to blacklists of insurance companies and agents, see 91 Cong. Rec. 1485-86 (1945) (remarks of Sen. O'Mahoney), it demonstrates only that such blacklists were a concern of the Congress—perhaps even the principal concern—but does not show that they were the *only* concern. Indeed, other remarks by the same speaker, Senator O'Mahoney (one of the bill's managers), indicate that his concern was more general: he was at pains to make clear that while the McCarran Act approved state regulation of the business of insurance, it did not sanction "regulation by private combinations and groups." *Id.* at 1483.¹⁹ And it is not surprising that blacklists of insurance

¹⁸ H. R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945). The only difference is that the House Report refers to "any act of boycott, coercion, or intimidation" whereas the Senate Report, in the first sentence quoted, refers to "*any agreement or act* of boycott, coercion, or intimidation." This difference reflects the fact that the bill reported out of the House Committee did not expressly cover agreements, whereas the Senate version did. See note 16 & accompanying text *supra*.

¹⁹ Senator O'Mahoney assessed the import of the boycott exception

companies and agents should be singled out as an example of the conduct to be prohibited, since such practices were apparently widespread prior to the Act. See *id.* at 1087 (remarks of Congressman Celler); *id.* at 1485-86 (remarks by Senator O'Mahoney).

A close reading of *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533 (1944), which precipitated the passage of the McCarran Act, and upon which the Supreme Court relied heavily to determine the meaning of the "business of insurance," see Part II *supra*, provides further support for our conclusion. The indictment in that case alleged a conspiracy by an association of insurance companies and agents, along with its members, to fix premium rates and monopolize the insurance business. But the indictment also charged additional violations of the Sherman Act, involving practices in aid of the price-fixing and monopolization scheme; and the Supreme Court used the terms "boycott," "coercion," and "intimidation" to describe these additional practices. See 322 U. S. at 535-36, quoted in note 20 *infra*.

It is thus apparent that the boycott provision of the McCarran Act was intended to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of "boycott, coercion, or intimidation" to the prohibitions of the Sherman Act. And the Supreme Court's opinion reveals that, while a blacklist of insurance companies and agents was alleged, another type of boycott was also involved: *policyholders* of insurance companies that were not mem-

as follows:

"... any attempt by a small group of insurance companies to enter into an agreement by which they would penalize *any person or any business* which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision."

91 Cong. Rec. 1480 (1945) (emphasis supplied).

bers of the association "were threatened with boycotts and withdrawal of all patronage."²⁰ We find it hard to believe that Congress would have intended a construction of the boycott provision which excludes from its sweep activities explicitly addressed in the case from which its language is drawn.

IV.

[*Existence of Boycott*]

The narrow construction of the boycott provision has the virtue of embodying a bright-line test, at least to the extent that all activities which are not directed against insurance companies or agents automatically fall outside the exception. As a result of our rejection of this construction, we must face the delicate task of determining whether the practices alleged by appellants constitute "boycott, coercion, or intimidation" within the meaning of this provision. The District Court feared that to read the boycott provision to include any of these practices would "emasculate" the antitrust exemption provided by the McCarran Act. 406 F. Supp. at 32, quoting *Meicler v. Aetna Casualty &*

²⁰ The Court's opinion describes the acts of boycott, coercion, and intimidation as follows:

*** The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, *and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms*. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; *and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycotts and withdrawal of all patronage*. The two conspiracies were effectively policed by inspection and rating bureaus in five of the six states, together with local boards of insurance agents in certain cities of all six states.

322 U. S. at 535-36 (emphasis supplied).

Surety Co., supra, 506 F. 2d at 734. See also *Addrissi v. Equitable Life Assurance Society, supra*, 503 F. 2d at 729. Although we recognize that the terms of the provision are not self-defining, and are capable of being read in such a way as to swallow the antitrust exemption, we do not think the solution is to restrict the boycott exception in a manner unsupported by its plain language, its legislative history, or the historical context in which it was passed. Rather, the terms must be applied in such a way as to accommodate the respective purposes of the Act's antitrust exemption, on the one hand, and the boycott exception to that exemption, on the other.

The facts in *South-Eastern Underwriters* are a useful guidepost. Logically speaking, a simple agreement among insurance companies to charge premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. See P. Areeda, *Antitrust Analysis* 380-81 (2d d. 1974). But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion, or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since a construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that in a rate-setting context something in the way of enforcement activity would be required to make out a claim of "boycott, coercion, or intimidation" within the meaning of the Act.²¹

²¹ In the *Meicler* case decided by the Fifth Circuit, it appears that the alleged boycott consisted of nothing more than adherence by a group of insurance companies to premium rates set by a state regulatory agency, or perhaps by private agreement. Although "[i]t cannot be disputed that the terms boycott and coercion, as common-

[Repair Shop Coercion]

Similarly, in the case at bar, appellants' contention that the insurance companies entered into a horizontal agreement to pay or reimburse insureds according to a common formula based on the prevailing labor rate would not, as such, state a claim under the boycott provision, even though such an agreement could perhaps be characterized as a collective refusal to deal except at the prevailing rate. Nor are the arrangements with preferred shops, in and of themselves, enough to make out a claim of coercion or intimidation. To be sure, even without the threat of a complete boycott of those shops which charge more than the prevailing rate, repair shops would be under economic pressure to accede to the terms of the horizontal agreement and thereby achieve favored status. But so long as policy holders are not prevented from utilizing non-preferred shops, the degree of coercive enforcement activity required to convert mere cooperation or concert of action into "boycott, coercion, or intimidation" is not present. Compare *Travelers Insurance Co. v. Blue Cross*, discussed in note 12 *supra*, 481 F.2d at 84 (economic pressure on hospitals to sign agreements with Blue Cross did not amount to "coercion"), with *Battle v. Liberty National Life Insurance Co.*, *supra*, 493 F.2d at 51 (threats to build competing facilities and cancel contracts of funeral homes refusing to cooperate, in addition to acts of physical violence, held to state a claim of boycott, coercion, or intimidation).

ly defined, might be construed to encompass [this] type of activity," *Meicler, supra*, 372 F. Supp. at 513, the foregoing analysis convinces us that the Fifth Circuit was correct in concluding that the boycott exception was not satisfied, and that a contrary result would "emasculate" the Act's antitrust exemption. See 506 F.2d at 734. Of course, the fact that we would reach the same result without relying upon the narrow construction of the boycott provision serves to illustrate that such a construction is not itself necessary to avoid emasculation of the Act.

[Repair Shop Boycott]

By the same token, the allegation that appellees engaged in a group boycott of repair shops which refused to accede to the prevailing labor rate does state a claim within the boycott exception.²² There is a distinction, we believe, between telling policyholders the amount of reimbursement they will receive and informing them as to the repair shops which have agreed to accept this amount as payment in full, on the one hand, and collectively refusing to allow policyholders to use their reimbursement checks at shops other than the preferred shops, on the other. Whereas the former merely exerts economic pressure on the shops, the latter unnecessarily penalizes non-favored shops, and stifles any market by preventing policyholders from dealing pressure in the direction of increased prices with shops which charge more than the prevailing rate. Moreover, in the latter situation, legitimate increases in the actual labor rate are less likely to get reflected in the amounts paid by the insurance companies, and the profit margins of even the preferred shops might get squeezed unfairly. Such collective use of the insurance companies' power, to enforce the terms of a horizontal price-fixing agreement, would thus constitute "boycott, coercion, or intimidation" within the meaning of the boycott provision.

V.

[Trial v. Summary Judgment]

The question at this stage of the proceedings is whether appellants have come forward with sufficient evidentiary support for their allegation of a group boycott to justify

²² We need not decide whether the boycott exception would be satisfied by a claim that each insurance company, acting independently of the other insurance companies, entered into a combination or conspiracy with its policyholders to boycott appellants' shops, since appellants have only charged a group boycott by the insurance companies themselves.

a full trial on the merits of that claim. See, e.g., *E. P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 205 (D.C. Cir. 1974). Rule 56(e) of the Federal Rules of Civil Procedure provides that a party opposing summary judgment "may not rest upon the mere allegations . . . of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Although caution must be used in granting summary judgment in complex antitrust actions, see, e.g., *Poller v. Columbia Broadcasting System, Inc.* [1962 TRADE CASES ¶ 70,228], 368 U.S. 464, 473 (1962), the dictates of rule 56(e) are fully applicable, and significant evidence substantiating the theory of the complaint must be produced, if a well-supported motion for summary judgment is to be defeated. See, e.g., *Gordon v. New York Stock Exchange, Inc.* [1975-1 TRADE CASES ¶ 60,367], 422 U.S. 659, 686-87 (1975); *First National Bank v. Cities Service Co.* [1968 TRADE CASES ¶ 72,458], 391 U.S. 253, 274-90 (1968); *Solomon v. Houston Corrugated Box Co.* [1976-1 TRADE CASES ¶ 60,699], 526 F.2d 389, 393-96 (5th Cir. 1976); *ALW, Inc. v. United Air Lines, Inc.* [1975-1 TRADE CASES ¶ 60,138], 510 F.2d 52, 54-57 (9th Cir. 1975). As the Supreme Court noted in *First National Bank v. Cities Service Co.*, *supra* at 289-90:

. . . Rule 56(e) should [not], in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

The District Court concluded that appellants' allegation of a group boycott lacked adequate record support. See text accompanying note 7 *supra*. We agree, and therefore notwithstanding our disagreement with the District Court's narrow construction of the boycott provision, the grant of summary judgment in favor of appellees must be upheld.

We note, first, that appellants' own deposition testimony shows that during the relevant time period each in fact transacted business with policyholders of most, if not all, of the insurance companies presently before us. This does not conclusively rebut appellants' claim, since the alleged group boycott may only have been partially successful or, alternatively, the conspiracy may have been designed only to reduce, not completely eliminate, transactions with non-cooperative shops.²³ But the absence of a complete refusal to deal did make it all the more important, if appellants wished to survive summary judgment, for them to come forward with some additional evidence tending to prove a tacit or express boycott agreement among appellees.

Appellants have devoted most of their brief to a rambling description of the documents in the record which, in their view, create a genuine issue of fact with respect to the boycott claim. But, try as they might, they have been unable to point to any evidence whatsoever, in a ten-volume record supplemented by several boxfuls of materials compiled during three years of extensive discovery, that supports the existence of a contract, combination, or conspiracy among appellees to boycott non-cooperative shops.

None of the documents cited by appellants show any contacts between or among appellees in furtherance of a boycott arrangement; and there is no evidence of a black-

²³ We cannot agree with the District Court's opinion to the extent that it is premised on the belief that a total refusal to deal is necessary to prove a group boycott in violation of the Sherman Act. See note 7 *supra*.

list of disfavored repair shops, or any collective decisions as to which shops should receive preferred status. The most that can be said is that several of the insurance companies may have adopted similar techniques for controlling their spiraling claims payments, such as establishing drive-in claims facilities and directing insureds away from "non-captive" repair shops. Since those techniques apparently were in the independent self-interest of each individual insurance company which adopted them, regardless of what the other insurance companies decided to do, this evidence of parallel conduct does not in any way tend to establish a boycott agreement, tacit or otherwise. See *Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 681 (1962).

The grant of summary judgment in favor of appellees is, accordingly,

Affirmed.

Dissenting Opinion

WRIGHT, Cir. J., dissenting: The court, after rejecting the legal principles relied on by the District Court in granting summary judgment to appellees, analyzes the evidence itself and comes to the same result. While the temptation to avoid the jury trials in antitrust cases is understandable, I would resist that temptation in this case since I believe the evidence offered by both sides on the motion for summary judgment was sufficient to have a jury resolve, on proper instructions, the issues raised relating to the business of insurance, conspiracy, and boycott. The Supreme Court has cautioned against affirming summary judgments in antitrust cases by drawing inferences from the evidence that should have been reserved for the jury. See, e.g., *Poller v. CBS, Inc.* (1962 TRADE CASES ¶ 70,228], 368 U. S. 464, 473 (1962). This caution applies, in my judgment, with particular emphasis where the District Court

has granted summary judgment after applying the wrong legal principles to its appraisal of the evidence.

Most of the evidence offered by both sides on appellees' motion for summary judgment is fairly outlined in the court's opinion. On that evidence a jury could reasonably have found, as appellants suggest, that the conspiracy consisted of an agreement among appellee automobile insurers to gain an advantage over their competitors by limiting appellees' cost of car repairs through boycott of car repairmen who refuse to make car repairs at the dictated prices.

In addition, other evidence fairly shows that the automobile repair industry is one marked by competition as to both price and quality of service. It would also support a finding that insurers were concerned that poor service caused by paying too low a rate for repairs would lead to dissatisfaction among insureds. Accordingly, it is not unreasonable to suggest, as appellants have done, that a jury could conclude that concerted action was needed if appellee insurance companies were to achieve both low cost repairs and adequate service. The record would also support a finding that appellee insurance companies sought to attain that objective by communicating among themselves on such matters as the most effective use of the insurers' drive-in claim service where claims would be adjusted and checks drawn for presentation to "captive" repair shops. In addition, there is evidence that some insurers issued two-party settlement checks naming as payees the insured and a "captive" body shop. Obviously the effect of this activity was to steer customers away from disfavored shops and would, in my opinion, justify a finding of boycott, especially since such steering would seem an integral part of effectuating the insurers' plan to direct volume business to their "captive" shops, thereby putting price pressure on independents.¹

¹ While I do not concede the need to reach the question of the

By sketching the evidence favorable to appellants, I do not mean to suggest that a reading of boycott or conspiracy in restraint of trade is inevitable on the evidence in this case. Certainly the majority has a point in its observation that persons acting independently might have an incentive to adopt some of the elements of the claims adjustment scheme adopted by the appellee insurers.² My position, however, is simply that it is not the job of this court to put the best face possible on the evidence from appellees' point of view. Under the law, on appellees' motion for summary judgment precisely the opposite approach is required. *E. g., United States v. Diebold, Inc.* [1962 TRADE CASES ¶ 70,322], 369 U. S. 654, 655 (1962). Under the proper standard, I submit, appellants tendered sufficient evidence to go to the jury.

I respectfully dissent.

scope of the McCarran-Ferguson Act's boycott exception, I do agree with Part III of the majority opinion insofar as it rejects the narrow view of that exception adopted by the Fifth and Ninth Circuits.

² I find unpersuasive the majority's suggestion that appellees were not trying to obtain a competitive advantage, but were just trying to keep the price of car repairs, and thus insurance premiums, down. Even though the object is beneficial, insurers may not seek to achieve it by conspiring to tamper with the economics of the car repair industry, or the insurance industry itself for that matter, by boycott. 15 U. S. C. § 1013(b) (1970).

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA,
CIVIL DIVISION.

Dec. 18, 1975.

Civ. A. No. 249-72.

Phillip M. PROCTOR, d/b/a Proctor Auto Service, et al.,
Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, an Illinois Corporation, et al., *Defendants.*

Memorandum Opinion

PRATT, *District Judge.*

This is an action by four plaintiffs in the automobile repair business against five automobile insurance companies and two companies in the business of adjusting damage claims. Plaintiffs charge defendants with violations of the Federal antitrust laws and, more specifically, with conspiracy to fix prices, in allegedly agreeing to pay only the prevailing rates for labor and parts in the adjustment of the damage claims of defendants' insureds or on their behalf.

While several other motions are pending, this Memorandum concerns only the two motions for summary judgment filed on behalf of the five insurance company defendants on the ground that their activities, whether or not otherwise constituting Federal antitrust violations, are outside the scope of the Federal antitrust laws because of the antitrust exemption for insurance companies provided by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (hereinafter referred to as the "McCarran Act"). This Act, passed in response to the Supreme Court's decision in

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) holding that insurance transactions were subject to Federal regulation under the commerce clause and that the antitrust laws were particularly applicable to such transactions, exempts the insurance business from regulation under the Federal antitrust laws provided that two criteria are met: (1) that the "business of insurance" is involved, and (2) that there is state regulation of the business of insurance.

The McCarran Act does not apply to the acts of "boycott, coercion and intimidation." For the reasons which are set forth, we agree that the McCarran Act exemption insulates the activities complained of and that the five insurance company defendants are entitled to summary judgment.

A. *The adjustment and settlement of claims, of which the practices challenged herein are an integral part, are clearly the business of insurance within the meaning of the McCarran Act.*

For the exemption under the McCarran Act to be operative, the primary requirement is that the particular practice concern the "business of insurance" 15 U.S.C. § 1012 (b). Although formal proof would seem unnecessary, the extensive record in this case shows, and plaintiffs admit, (Complaint, ¶ 12) that the automobile property insurance business involves the adjustment and settlement of claims. The insurance policy itself, the premiums paid thereon, and the payment of any claims are the key elements of the business of insurance. As the Supreme Court said in the leading case of *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969) the term "business of insurance" includes

"the relationship between the insurer and insured,

"the type of policy, which could be issued, its reliability, interpretation, and enforcement * * *

"[and] other activities of insurance companies [which] relate so closely to their status as reliable insurers * * *

Claims-settlement procedures, on the basis of which plaintiffs have alleged that in settling claims the defendants have agreed among themselves to fix prices for automobile repairs, concern payments to insureds or on their behalf. Clearly, such procedures are closely connected with the relationship between the insurer and insured. The adjustment practices actually followed depend upon the type of policy and its coverage and directly concern matters of policy interpretation and enforcement. The way and method an insurance company discharges claims under its policies relate closely to its status as a reliable insurer. Claims-settlement procedures are clearly "the business of insurance" as defined in *National Securities, Inc., supra*.

Finally, claims-settlement procedures have a direct connection with an insurance company's rate-making structure. The record clearly shows a close relationship between the costs of automobile repairs in Pennsylvania and Virginia, the states where plaintiffs do business, and the levels of premiums charged by defendants to its insureds. It is a fact of life that the cost of repairs, including labor charges and the cost of repair parts, paid in the settlement of damage claims are an important factor in the rate-making structure of insurance companies obligated under their policies to pay damage claims.¹ Claims-settlement practices which include activi-

¹ As would be expected, the statutes of Pennsylvania and Virginia which control the establishment of insurance rates require that the cost of paying claims be reflected in level of premiums to be charged. 40 Pa.Stat. § 1183(a); Va.Code, § 38.1-252(3) (1973).

ties complained of in this suit have a vital impact on rate-making and must, of necessity, be included within the term "business of insurance." *Travelers Ins. Co. v. Blue Cross of Western Pa.*, 361 F.Supp. 774 (W.D.Pa.1972), *aff'd* 481 F.2d 80, 83 (3rd Cir. 1973), *cert. denied* 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1974); *California League of Ind. Ins. Pro. v. Aetna Cas. & S. Co.*, 175 F.Supp. 857 (N.D.Cal.1959).

Plaintiffs place great reliance on *American Family Life Insurance Co. v. Planned Marketing Associates, Inc.*, 398 F.Supp. 1141 (E.D.Va.1974).² Such reliance is misplaced because of the entirely different factual setting. The plaintiff therein alleged that defendant was attempting to steal plaintiff's agents, policy holders and trade secrets. As Judge Warriner's scholarly opinion points out, none of these activities were peculiar to the business of insurance and were therefore not exempt by virtue of the McCarran Act.

Plaintiffs' assertion that what is involved here is "the business of insurance" is a clever, but misleading turn of phrase. It is only partially true and completely misses the point that while the primary focus of the McCarran Act is the insurer-insured relationship, such relationship is not the all-inclusive boundary of that Act. The "business of insurance" can touch relationships between insurance companies and non-policy holders such as automobile repair shops when such relationships are closely connected with the insurer-insured relationship through the profound effect of the costs of damage claims in the rate-making structure. *California League of Ind. Ins. Pro. v. Aetna Cas. & S. Co.*, *supra* (price fixing agreement between insurance companies concerning size of commissions paid to agents).

² For what significance it may have, this matter was settled between the parties without appeal.

To conclude, the settlement and payment of damage repair claims is (1) a basic part of the contractual obligation owed by the insurance company to the insured, whether or not the payment is made to the insured or on his behalf, (2) directly affects the rate-making structure of the insurance company and the level of premiums to be charged, and (3) is connected directly with the writing of the policy, its interpretation and enforcement. The practices challenged here are *peculiar* to the business of insurance within the meaning of the McCarran Act.

B. The practices challenged in this case are regulated by Virginia and Pennsylvania within the meaning of the McCarran Act.

The second and other requirement of the McCarran Act is that such practices be "regulated" under state law.

It should be pointed out at the outset that the concept of state "regulation," for McCarran Act purposes, is one of considerable breadth. In this connection, it is the general rule that

"[A] state regulates the business of insurance within the meaning of § 1012(b) when a State statute *generally proscribes* (*F. T. C. v. National Cas. Co.*, 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540) or *permits or authorizes* certain conduct on the part of insurance companies." (Emphasis supplied) *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F.Supp. 857, 860 (N.D.Cal. 1959).

This case was cited with approval in *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178, 1181 (6th Cir. 1971), *cert. denied* 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972). See also *Crawford v. American Title Ins. Co.*, 518 F.2d 217 (N.D.Ala.1974).

While the character and extent of state regulation is the key to the exemption under the McCarran Act, our research indicates that in every McCarran Act case which has been reported, the pattern of state regulation has always been found sufficient to trigger the antitrust exemption. Such exemption is not affected by whether or not there is a conflict between the Federal antitrust laws and state regulations, whether or not the state enforces its regulations or whether such enforcement is effective. The mere existence of regulatory statutes capable of being enforced apparently is all that is required for the McCarran Act exemption to be applicable. See *Report of Senate Subcommittee on Anti-Trust and Monopoly*, S. Rep. 1834, 86th Cong., 2nd Sess. 5 (1960).

Since one of the plaintiffs does business in Virginia and three in Pennsylvania, our attention will now focus briefly on the laws of these two jurisdictions.

It is clear from the record before us that Virginia and Pennsylvania extensively regulate the practices challenged in this suit.

(1) *Virginia*

Virginia regulates the auto insurance business through its Bureau of Insurance, State Corporation Commission, pursuant to the Virginia Code. (6 Va. Code, Title 38.1) According to the Commissioner of Insurance of Virginia, this includes the claims-settlement practices of automobile insurers in the state. (Francis Aff. ¶ 2) Regulation contemplates and, in fact, authorizes a degree of uniformity in the actions of automobile insurance carriers through the (a) formation of rate service organizations to file proposed rates and rating plans. *Id.* §§ 38.1-242, 38.1-279.42; (b) cooperation among rate service organizations and automobile insurance companies with the exchange of loss information, experience data and information with respect to rating plans. *Id.* § 38.1-279.52 Through its Insurance Bu-

reau, Virginia reviews the claims handling procedures of automobile insurers to assure that the procedures are fair to the claimant, the insured, other policy holders and the members of the public. The Superintendent of Insurance has authority to take appropriate action to remedy any situation where an insurer acts improperly or unfairly in discharging its duty to settle and pay physical damage claims. (Francis Aff. ¶ 2, 3.)

At the same time, Virginia has an antitrust law similar to Section 1 of the Sherman Act. It has been interpreted *in pari materia* with the Sherman Act. Applicable to activities of insurance companies when not covered by the Virginia Insurance Code, the state antitrust law prohibits price-fixing by insurance companies. *Blue Cross of Virginia v. Virginia*, 211 Va. 180, 176 S.E.2d 439 (1970). In short, if the price-fixing allegations of plaintiffs are violations of the Sherman Act, they are also subject to the Virginia antitrust law, and because of the McCarran Act the Virginia law alone is applicable.

(2) *Pennsylvania*

As in Virginia, the automobile insurance business in Pennsylvania is extensively regulated by state law. The Pennsylvania Insurance Department pursuant to the Pennsylvania Code is the regulatory agency. 40 Pa.Stat. § 1 *et seq.* Certain cooperative practices, as in Virginia, are permitted. Most significantly, it deals more directly with the automobile damage repair business and gives its Insurance Commissioner jurisdiction over unfair settlement or compromise practices of automobile insurance companies. (40 Pa.Stat. § 1155) Furthermore, the Pennsylvania Motor Vehicle Physical Damage Appraiser Act is a regulatory scheme closely related to the practices at issue in this case. (75 Pa. Stat. § 3001 *et seq.*)

The McCarran Act requires only a general regulation by states of the business of insurance. In both Virginia

and Pennsylvania, the regulation is specific and, under the prevailing authorities, more than sufficient to bring the McCarran Act exemption into play.

C. The allegations of boycott, coercion and intimidation do not preclude the applicability of the McCarran Act exemption.

While plaintiffs concede that price-fixing in the settlement of damage claims is the core of their complaint, they also have alleged acts of boycott, coercion and intimidation. On the basis of said allegations, they assert that the McCarran Act exemption cannot apply because Section 1013(b) of the Act specifically provides that:

"Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

This contention is unavailing for at least two reasons. First, the claims of dispute as to material fact in this connection are vague and lack adequate record support. There appears to be no collective refusal to deal with plaintiffs since plaintiffs' services were utilized throughout the period of this suit by persons insured by plaintiffs.

Second, and perhaps more important, the boycott exception has been narrowly construed and does not have the breadth and reach which plaintiffs claim. Three recent cases are dispositive on the proposition that the "'boycott' [exception] under the McCarran Act has a very narrow meaning . . . [and] 'was placed in the legislation to protect insurance agents from the issuance by insurance companies of a "blacklist" which would name companies or agents . . .' *Transnational Ins. Co. v. Rosenlund* [1967 Trade Cases § 72025], D.C., 261 F.Supp. 12, 16-27." *Mitgang v. Western Title Insurance Co.*, 1974-2 CCH Trade Cases § 75322 at 98026 (N.D.Cal.1974); see

also *Addrissi v. Equitable Life Assurance Society*, 503 F.2d 725 (9th Cir. 1974), cert. denied 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975), and *Meicler v. Aetna Casualty & Surety Co.*, 372 F.Supp. 509 (S.D.Texas 1974), aff'd 506 F.2d 732 (5th Cir. 1975). In *Meicler*, which involved a collective refusal by insurance company defendants to deal with plaintiff except on the basis of a certain risk reclassification, the claim was dismissed by reason of the McCarran Act. The plaintiffs attempt to invoke the "boycott exception" was also unsuccessful, the Court stating "Appellant's broad construction of Section 1013(b) would emasculate the antitrust exception contained in Section 1012(b) of the McCarran-Ferguson Act." 506 F.2d at 734. Plaintiffs' attempt herein to invoke the "boycott exception" would have the same effect and cannot prevail on the facts of this case.

The allegations of boycott, coercion and intimidation do not raise questions of material fact sufficient to preclude the operation of Rule 56 and, even if such allegations had such effect, they are insufficient as a matter of law to prevent the application of the McCarran Act exemption.

CONCLUSION

For the reasons above set forth, the practices challenged are the "business of insurance" within the meaning of the McCarran Act and are comprehensively subject to state regulations by both Virginia and Pennsylvania. Accordingly, the motions for summary judgment by the five automobile insurance company defendants are granted. The above Memorandum Opinion shall comprise the Court's Findings of Fact and Conclusions of Law.

An Order consistent with the foregoing has been entered this day.

NOV 18 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1977

No. 77-580

PHILLIP M. PROCTOR, ET AL., *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
 COMPANY, ET AL., *Respondents*.

Petition for a Writ of Certiorari to the United States Court of
 Appeals for the District of Columbia Circuit

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-580

PHILLIP M. PROCTOR, ET AL., *Petitioners*,
v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, ET AL., *Respondents*.

Petition for a Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

This Memorandum is submitted on behalf of Respondents Liberty Mutual Insurance Company, Nationwide Mutual Insurance Company, The Travelers Indemnity Company, Allstate Insurance Company and State Farm Mutual Automobile Insurance Company in opposition to petitioners' request that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia in this matter.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, under the decision of this Court in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the adjustment and settlement by insurance companies of automobile physical damage claims submitted by or on behalf of policyholders pursuant to their insurance contracts constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act?
2. Whether the Court of Appeals correctly held that summary judgment should be granted and the complaint dismissed with respect to petitioners' allegations of boycott, coercion and intimidation?

COUNTERSTATEMENT OF THE CASE

This was an action by four automobile repair businesses in Virginia and Pennsylvania against five automobile insurance companies.¹ Petitioners alleged in their complaint that the defendant insurance companies had conspired to restrain trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on a method of determining the payments to be made to or on behalf of insureds in settlement of automobile physical damage claims rendered under insurance contracts. As noted by the Court of Appeals, "[a]fter three years of extensive discovery", the petitioners boiled their case down to a relatively simple charge: that the five insurance company defendants "had entered into a horizontal agreement to pay or

¹ The complaint also named as defendants two automobile insurance claims adjusting companies. During the pendency of the appeal, the two adjusting companies entered into a nominal settlement with the plaintiffs and were dismissed from the case.

reimburse their policyholders according to a common formula" (App., p. 4a.)²

On March 17, 1975, after the close of discovery, the defendants filed two motions for summary judgment. The first was based on the petitioners' complete failure, after three years of discovery, to adduce any evidence in support of their allegations of agreement. The second motion argued that, even if the defendants had so agreed, the claims adjustment practices challenged by the petitioners were part of the "business of insurance" and thoroughly regulated by the States of Virginia and Pennsylvania. Thus, defendants contended that, by virtue of the antitrust exemption contained in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, the agreement charged by the petitioners, even if proven, would be outside the scope of the federal antitrust laws, could provide no basis for federal recovery, and could properly be considered only by state officials under state law.

In a comprehensive memorandum opinion issued on December 18, 1975, District Judge Pratt granted the defendants' summary judgment motion based principally on the McCarran-Ferguson Act and ordered the complaint dismissed. (App., pp. 33a-41a.) On June 17, 1977, the United States Court of Appeals for the District of Columbia Circuit, in an extensive opinion by Circuit Judge McGowan, affirmed the District

² According to the petitioners, the various insurance companies agreed to utilize "only the prevailing labor rate in adjusting and settling [damage] claims". (App., p. 4a.) As the Court of Appeals noted, the petitioners did not contend that "the different insurance companies had in fact employed a common hourly rate at all times, or agreed to set the hourly rate at a particular dollar amount. . . ." (*Ibid.*)

Court's order (Circuit Judge Wright, dissenting). (*Id.*, pp. 1-32a.) A Petition for Rehearing and Suggestion for Consideration *En Banc* was denied by the Court of Appeals on July 22, 1977.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

In its petition to this Court, petitioners advance two reasons why a writ of *certiorari* should be issued: (i) because the Court of Appeals' decision that the acts charged by the petitioners constituted the "business of insurance" within the meaning of the McCarran-Ferguson Act was allegedly inconsistent with this Court's holding in *SEC v. National Securities, Inc.*, *supra*; and (ii) because the Court of Appeals erred in affirming the issuance of summary judgment on the issue of boycott, coercion and intimidation. We respectfully submit that neither of these two arguments affords any basis for the issuance of *certiorari* and review of the Court of Appeals' decision.

I. The Holding by the Court of Appeals That the Claims Settlement Practices in Issue Below Constitute the "Business of Insurance" Within the Meaning of the McCarran-Ferguson Act Was Correct as a Matter of Law and Clearly Consistent With This Court's Holding in *SEC v. National Securities, Inc.*

Contrary to petitioners' assertion that the Court below acted inconsistently with the decision of this Court in *National Securities*, the Court of Appeals recognized that any analysis of the scope of the "business of insurance" exemption to the antitrust laws in the McCarran-Ferguson Act "must begin" with this Court's decision in *SEC v. National Securities, Inc.*, *supra*. (App., p. 7a.) The Court of Appeals noted that, in *National Securities*, this Court held that the scope

of the antitrust exemption afforded in the McCarran-Ferguson Act "was not intended to cover all of the activities of the insurance companies. . . ." (*Id.*, p. 9a.) Instead, as the Court of Appeals found, this Court in *National Securities* established the following standard for determining when the conduct of any insurance company fell within the "business of insurance" exemption in the McCarran-Ferguson Act:

"Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. Certainly the fixing of rates is part of this business . . . The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute . . . *The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'* Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." *SEC v. National Securities, Inc.*, *supra*, 393 U.S. at 459-60, cited at App., pp. 9a-10a. (Emphasis supplied in Court of Appeals' decision.)

Applying this standard, the Court of Appeals held that the challenged practices here fell within each of the elements of the "business of insurance" identified by this Court in *National Securities*:

"Applying this standard to the facts before us, we have little doubt that what appellants have characterized as the 'core' of their case, the al-

leged horizontal agreement to pay insureds' claims on the basis of the prevailing labor rate, as well as appellees' supposed adherence to a common formula to compute damage estimates, fits within the 'core' of the 'business of insurance.' The essence of the automobile insurance contract is the insurance company's agreement, in ret[ur]n for a premium, to make payments to or on behalf of the policyholder for losses arising out of the ownership, maintenance, or use of an automobile. *The determination by the insurance company of the amount to be paid in discharge of this contractual obligation is at the heart of the relationship between insurer and insured, and is directly connected with the reliability, interpretation, and enforcement of the insurance contract.*" (App., p. 10a.) (Emphasis supplied.)

The Court of Appeals held that, for the above reasons, the alleged horizontal agreement by insurance companies to establish a common formula in the adjustment and settlement of claims, even if proved by the petitioners, fell directly within the "business of insurance" as defined by this Court in *National Securities* and thus was subject to state, not federal, regulation.³

The Court of Appeals further held that the same conclusion followed with respect to petitioners' allegation that, pursuant to the alleged horizontal agreement, individual insurance companies had entered into vertical agreements with so-called "preferred shops" since these alleged vertical agreements were also "con-

³ There was no dispute below that the matters in issue were extensively subject to regulation within the meaning of the McCarran-Ferguson Act under the insurance codes and other statutes by Insurance Commissioners and others in the States of Virginia and Pennsylvania, the states where the four plaintiffs resided.

nected closely enough to the contractual relationships between appellees and their policyholders, and with reliability, interpretation, and enforcement of those contracts, to qualify as the business of insurance." (App., p. 11a.) According to the Court:

"By the very terms of their allegations, appellants concede that these practices stemmed solely from appellees' desire to slow the rate of increase in the claims payments required to satisfy the companies' contractual obligations to their policyholders. Notwithstanding their effect on non-policyholders, the activities unquestionably grow out of, and are tied to, the claims adjustment and settlement process." (App., p. 12a.)⁴

Finally, the Court of Appeals noted that a finding that the acts alleged by the petitioners constituted the "business of insurance" was supported by the close relationship between the amounts paid by insurance companies to settle claims and insurance rates. As the Court of Appeals noted, "in a case involving similar activities, the Third Circuit concluded that the substantial impact on rates . . . was sufficient to satisfy the statutory standard, based on the language in *National Securities* to the effect that the business of insurance includes 'other activities of insurance companies [which] relate so closely to their status as reliable insurers.'" *Travelers Insurance Co. v. Blue Cross*, 481 F.2d 80, 82-83 (3d Cir.), cert. denied, 414 U.S. 1093 (1973). (App., pp. 13a-14a.) Based on undisputed facts below, the Court of Appeals held the relationship between amounts paid to settle physi-

⁴ As the Court noted, "the fact that a practice may affect other types of business is not dispositive of whether it is sufficiently related to the business of insurance to come within the McCarran Act's protection." (App., p. 11a.)

cal damage claims and insurance rates was clearly present in the instant case:

"Of central significance in this entire context is the close relationship between the cost of reimbursement [of] damage claims, on the one hand, and the insurance rates charged by appellees, on the other. Any doubt as to whether these activities should be deemed to fall within the business of insurance is ponderably eased by that economic reality." (App., p. 13a.)

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals that the acts in issue constituted the "business of insurance" within the meaning of the McCarran-Ferguson Act was clearly correct and wholly consistent with this Court's opinion in *SEC v. National Securities*.⁸ Accordingly, no basis exists for review by this Court.

II. The Decision by the Court of Appeals That Summary Judgment Should Be Granted With Respect to Petitioners' Allegations of Boycott, Coercion and Intimidation Was Correct and Wholly Consistent With This Court's Prior Holdings

The second reason advanced by the petitioners as to why this Court should review the Court of Appeals' decision is that the Court of Appeals improperly sus-

⁸ The petitioners' suggestion that confusion exists with respect to the application of *National Securities* is without merit. The lower courts have uniformly applied the standards set forth in *National Securities* with differences in result being based on the specific facts of each case. See, e.g., *Workman v. State Farm Mut. Automobile Ins. Co.*, Civil No. 75-1799 (N.D. Cal. Sept. 16, 1976); *Frankford Hospital v. Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976); *Anderson v. Medical Service*, 1976-1 Trade Cases ¶ 60,884 (E.D. Va. 1976); *Royal Drug Co., Inc. v. Group Life & Health Insurance Co.*, 556 F.2d 1375 (5th Cir. 1977).

tained the dismissal of the complaint with respect to petitioners' allegations of boycott, coercion and intimidation. Under the McCarran-Ferguson Act, the antitrust exemption does not apply to those antitrust violations which are carried out by acts of boycott, coercion and intimidation. 15 U.S.C. § 1013(b).⁹ Circuit Judge McGowan, writing the majority opinion, held that the District Court had properly reviewed the undisputed facts in the record and concluded that there was no factual basis for any kind of boycott, coercion or intimidation and that summary judgment should be granted and the complaint dismissed. The petitioners, quoting extensively from Circuit Judge Wright's dissenting opinion, contend that the majority's conclusion with regard to this issue was incorrect.

We respectfully disagree and believe that the decision of the majority of the Court of Appeals was clearly correct. Indeed, contrary to petitioners' assertions, that decision was wholly consistent with this Court's decisions on the proper role of summary judgment in complex antitrust cases.

⁹ The issues raised in this case with respect to the boycott exemption in the McCarran Act are in no respect like those raised in *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3 (1st Cir. 1977), cert. granted, 46 U.S.L.W. 3293 (Oct. 31, 1977). In *Barry*, the First Circuit defined the scope of the boycott, coercion and intimidation exemption in the McCarran-Ferguson Act more broadly than had other Courts of Appeals. The issue raised by the petition for *certiorari* before this Court in *Barry* is whether the definition of boycott, coercion and intimidation adopted by the First Circuit or by other Courts of Appeals is correct. The proper definition of the boycott exemption to the McCarran-Ferguson Act is not in issue in this case. (Indeed, the Court below decided the issue in petitioners' favor and gave the petitioners the benefit of the broadest definition of boycott for purposes of analysis.)

As Circuit Judge McGowan acknowledged in the majority opinion, under the decisions of this Court "caution must be used in granting summary judgment in complex antitrust actions . . ." (App., p. 28a.)⁷ However, as Circuit Judge McGowan further recognized, this Court held in *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968)—a case not even cited by petitioners to this Court—that the use of summary judgment is available and appropriate under proper circumstances in antitrust cases. (*Ibid.*) As this Court noted in *Cities Service*:

" . . . Rule 56(e) should [not], in effect be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations . . . While we recognize the importance of preserving litigants' rights to a trial on their claims, *we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.*" (App., p. 28a.) (Emphasis supplied.)

Circuit Judge McGowan in his opinion carefully reviewed the undisputed factual material in the record, as had the District Court, and concluded, under the *Cities Service* test, that this was an appropriate case for the issuance of summary judgment with respect to the question of boycott, coercion and intimidation. The Judge noted that petitioners' "own deposition testi-

⁷ See *Poller v. CBS, Inc.*, 368 U.S. 464 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

mony shows that during the relevant time period each [of the named petitioners] in fact transacted business with policyholders of most, if not all, of the insurance companies presently before us." (App., p. 29a.) According to the Judge:

" . . . the absence of a complete refusal to deal did make it all the more important, if . . . [petitioners] wished to survive summary judgment, for them to come forward with some additional evidence tending to prove a tacit or express boycott agreement among appellees." (App., p. 29a.)

Circuit Judge McGowan found that petitioners had not come forward with the missing evidence of a boycott. Indeed, as noted by the Judge, the so-called review of the documentary evidence in the record which made up most of the petitioners' argument before the District Court and brief to the Court of Appeals on this issue did not create any material issues of fact or controvert the conclusion that summary judgment was proper:

"Appellants have devoted most of their brief to a rambling description of the documents in the record which, in their view, create a genuine issue of fact with respect to the boycott claim. But, try as they might, they have been unable to point to any evidence whatsoever, in a ten-volume record supplemented by several boxfuls of materials compiled during three years of extensive discovery, that supports the existence of a contract, combination, or conspiracy among appellants to boycott noncooperative shops." (App., p. 29a)⁸

⁸ Judge McGowan further noted that arguments of a conspiracy based on alleged parallel conduct were unavailing since the acts complained of were in the "independent self-interest of each individual insurance company which adopted them, regardless of

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals granting summary judgment on the issue of boycott, coercion and intimidation was wholly correct and fully consistent with this Court's opinions on the proper role of summary judgment in antitrust cases.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: November 18, 1977

what the other insurance companies decided to do . . .", so that the alleged evidence offered by the petitioners of parallel conduct did "not in any way tend to establish a boycott agreement, tacit or otherwise." (App., p. 30a.)